IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 195 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

HEIRS OF NOORMOHMED UMARBHAI DARBAN

Versus

HEIRS OF DECD. SATARBHAI MUSABHAI DARBAN

Appearance:

MR JR NANAVATI, SR. ADVOCATE FOR MR YN RAVANI for Appellants.

MR PG DESAI, SR. ADVOCATE FOR MS TRUSHA K PATEL for Respondents No. 1 to 4.

MS DARSHANA DIVAKARA for Respondents No. 5/A & 5/B

Respondent No.6(A) served

CORAM : MR.JUSTICE J.R.VORA

Date of decision: /09/2001

C.A.V.JUDGEMENT

1. The present Appeal From Order is filed by

original defendant No.2(A) to 2(D) and 3(A) to 3(G) being aggrieved and dissatisfied by the order passed by Second Jt. Civil Judge (SD), Amreli, below Exh.5 an Application for the interim injunction in Spl. Civil Suit No. 62 of 2000, which is of dated 17th of April, 2001. By this Application Exh.5, learned Civil Judge (SD), allowed the Application - Exh.5 of the original plaintiffs and granted interim injunction in terms of Para 8A of the said Application.

2. As per the brief facts of the case, original plaintiffs - respondents No. 1 to 4 instituted Spl. Civil Suit No. 62 of 2000 before the Trial Court seeking relief through amendment of plaint subsequently of the declaration that the Mutation Entry No. 44 in the Village Form No.6 pertaining to the land bearing Survey Nos. 187, 17 1/1, 176, 188 and 152 of Village Uchchaiya, Taluka Rajula, District Amreli, be declared illegal and the same be declared without jurisdiction and nullity and other entries made in pursuant to above said entry in revenue record i.e. Entries No. 231, 235, 236, 131, 79, 96, 317, 295, 226 and 134 also be declared null, void, illegal and without jurisdiction. Further declaration also sought that the defendants have no right, title, or interest in the suit property, which belonged to the absolute ownership of the plaintiffs. Further declaration was also sought that compensation under the Land Acquisition Act are required to be paid to the plaintiffs and defendants have no authority to receive the amount of compensation for the suit land in question. The plaintiffs in the above said suit also sought the relief of permanent injunction to the effect that defendants be restrained from transferring, selling and disposing of the suit property by way of gift, etc. of the suit land in question to any third parties. Through Application Exh.5 an interim relief was sought to the above effect that the defendants be restrained from transferring or alienating the suit land in question during the pendency of the suit. Initially, ad interim relief was granted to the plaintiff and thereafter it was made absolute, and being aggrieved, this Appeal is filed by the above said defendants.

3. The history of the case goes beyond the period of 50 or more years from now. It is the case of the plaintiffs that one Musabhai Umarbhai of village Uchchaiya had purchased the property in an auction and for which they have relied on a rojkam which is at Mark 4/9 of the record of the Trial Court and basing this and some accounts of the erst while State, it was emphatically stated by the plaintiffs that Musabhai was

the only owner of the property and the Entry No.44 in the Revenue Record in the joint name of the brothers of Musabhai was without jurisdiction and has no force of law. The facts go to show that there were 5 brothers, namely, Musabhai Umarbhai, Abdulkarim Umarbhai, Noormohmmed Umarbhai, Kasambhai Umarbhai and Isabhai Umarbhai. Facts further go to show that in the year 1959 in the revenue record vide Entry No.44 after the Independence, the land i.e. land in question was recorded in the name of these five brothers as joint tenants and thereafter in subsequent entries, the partition amongst all these five brothers, and further partition amongst the heirs of each of the brothers has been recorded, and this Entry No.44 posted in 1959 and subsequent entries of revenue record are challenged in the suit stating that Musabhai Umarbhai was alone the owner of the property and none else has any authority to deal with the suit property. The plaintiffs 1, 2 and 3 are sons of Musabhai Umarbhai Darbon. Since plaintiff No.3 has died, his heirs have been brought on record. While the defendant No.1 Abdul Karimbhai Umarbhai has since died, his heirs are on record as defendants No.1(A) Umarbhai Abdul Karimbhai Darban and 1(B) Mohmmedali Abdul Karimbhai Darban. Other brothers of Musabhai Umarbhai are defendants in the suit. All the three brothers i.e. Abdul Karimbhai Umarbhai, Noormohmed Umarbhai Darbn and Isa Umarbhai Darban have since died, their heirs are on record as defendants.

4. The learned Trial Judge has believed the case of the plaintiffs that in Rojkam at Mark 4/9, according to the learned Civil Judge (SD), Amreli, Musabhai Umarbhai had purchased the property in an auction from the State and he was alone the owner of the property in question and, therefore, the entries made in the revenue record vide Entry No.44 in 1959 and subsequent entries had no evidentiary value, which other wise bears only presumptive value and hence the interim injunction was granted by the trial court to the plaintiffs.

5. Learned Sr. Counsel Mr. J.R. Nanavatti for the appellants - original defendants, learned Sr. Counsel Mr. P.G. Desai for the respondent - original plaintiffs and learned Advocate Ms.Darshna Divakarar for respondents No. 5(A) & 5(B) were heard. Learned Advocate Mr. Nanavati objected that the relief claimed is barred by the statute i.e. Bombay Land Revenue Code 1879. That Section 135-L bars suit against the Government or any officer of Government for the entries made in the revenue record. Learned Advocate Mr. Nanavati further stated that the revenue record produced before the Trial Court

denotes that all the five brothers including Musabhai Umarbhai were in the possession of the suit land right from 1951 and thereafter vide Entry No. 44 which is a promulgation entry in pursuance of determination of the tenancy rights of five brothers is posted in the revenue record, which continues till today and no attempt at all has been made by any of the plaintiffs to challenge this entry and now when the Government has acquired the land and compensation is being paid to the defendants, the suit came to be filed in this manner in which, however, plaintiffs are able to obtain interim relief. Learned Advocate for the appellants vehemently stated that the suit is filed suppressing the materials which is on record and not placing the same before the Trial Court. It is stated that a proceedings, between the parties in which the plaintiff No.1 Satarbhai Musabhai Darban also was the party, under the Lands Ceiling Act was initiated against both the parties of the suit and vide Ceiling Case No. 74/63 on admission of the plaintiffs as well, the competent authority in the Ceiling Act, vide his order somewhere in March 1966 decided that each of the parties including plaintiffs as well as defendants were holding the land including the present suit land allotted to them to their respective shares and, therefore, there was no excess land. This decision of the Mamlatdar, Rajula, in Ceiling Case No. 74/63 which is placed on record has not been challenged further by any of the parties and has become final amongst the plaintiffs and the defendants. It was urged that not only that but the mutation entries in pursuance of Entry No.44 further entries were posted wherein at the request of the parties, the partition between the brothers and again heirs of each of the brothers were recorded by the revenue authorities, and these entries of revenue record have never been challenged by the appellants. Mr. Nanavati urged that this is not a case which rests only on the revenue entries made by the revenue authorities but this is a case wherein revenue authorities recorded the rights of the parties as asserted by themselves by making signed statements and inspecting the local position of the land. Therefore, according to Mr. Nanavati, there was an admission on the part of the plaintiffs that all the five brothers including Musabhai were holding the shares as tenant-in-common. In pursuance of tenancy proceedings they become the joint owners of the property which was around 300 acres in all and was partitioned amongst the five brothers. Thereafter, each of the brothers was holding his own share and on the death of brothers, their legal heirs were holding the share which was allotted to the particular brothers. The property which was allotted to

the plaintiffs out of the total property of 300 acres is in the possession of the plaintiffs and they are enjoying the same. The property which was allotted to the share of the defendants are in the possession of the defendants since last 50 years, and they are cultivating and enjoying the property. This position remains since 1951 till today and when the land acquisition proceedings were initiated in respect to the property which is in possession of the defendants, the suit came to be filed. In respect to the alleged title deed on which the plaintiffs have placed much reliance on Mark 4/9 Rojkam. Mr. Nanavati argued that the same is not the title deed as construed by the plaintiffs which is placed on Mark 4/9. It is urged that this is a mere rojkam whereby a property of the erst while girasdars was obtained by Musabhai in an auction for cultivation only. This is of 1947 and before the independence. This rojkam denotes that there will be a writing in pursuance of this rojkam on a stamp paper. The writing is not produced by the plaintiffs denoting that the same position i.e. the land which was obtained by Musabhai for the cultivation continued after 1947. In any case, this is not the evidence denoting that Musabhai Umarbhai alone purchased the suit property from the then State in an auction, as has been understood by the trial court. One of the brothers Abdullabhai Musabhai, as fact goes to show that, in May 1965 to an alleged reply to a notice of the learned Advocate for the plaintiffs, has admitted that the property belonged to Musabhai, is not binding on the defendants. Even this supporting defendants, Abdul Karimbhai Umarbhai was, in fact, in possession of his share on partition and his heirs are enjoying the property, which is allotted to the share of Abdul Karimbhai, and that, the reply of Abdul Karimbhai Umarbhai, which is placed at Mark 4/6 of the Trial Court, is absolutely not useful to the plaintiffs. It is urged that the Trial Court did not even attempt to enter into the appreciation of these facts. It was in shape of evidence on record and trial court proceeded to consider the only evidence of rojkam and misconstrued the same to the title deed, by which it was held that Musabhai purchased the property in an auction from the State and he was the sole owner of the property. On the above grounds, it is urged that the Appeal be allowed and the judgment and order of the Trial Court which is impugned be quashed and set aside.

6. On the other hand, learned Advocate Mr. P.G. Desai, for the respondents has urged that the defendants have not shown any documents by which they have become the owner of the suit property. Mr. Desai again has

placed heavy reliance on Mark 4/9, by which it is urged that this is the document by which Musabhai has purchased the property in an auction from erst while State and the revenue entries subsequently made are wrongly made, which has only presumptive value. It is urged that from 1947 to 1955, the name of Musabhai continued in revenue record and account, which is placed at page 267 (Bhanakatu), which denotes that the amount of the auction purchase is deposited in the name of Musabhai in the accounts of the State. The attention of this Court is drawn to the Village Form No. 13 wherein also the name of Musabhai appears as the holder of the land in question. It was urged that vide written statement, the defendants have claimed the property as heirs of Musabhai. It was urged that it is against the principle of Mohammedan Law. The attention of this Court was also drawn to the provisions of the Mohammedan Law. It was also urged that along with the claim of legal heirs of deceased Musabhai, the defendants have also claimed the property, taking shelter of the principle of adverse possession, which is not permissible. The attention of this court was also drawn in respect to Entry No.44. The attention of this Court was also drawn to Rule 105 of the Gujarat Land Revenue Rules, 1972 in respect of the Entry No.44. Rule 105 denotes that when the record of rights is first introduced in any village, as soon as the preparation has begun, the village accountant shall cause notice thereof to be given by beat of drum and shall paste a written notice in the chavdi. He shall also write at the head of the record a certificate that such notice was duly given. Prior to the preparation of the fair copy of the record of rights, the village accountant shall prepare a rough copy of the record in form of an Index of Lands with all rights noted against each parcel. Until the fair copy is prepared, such rough copy shall be used as and be deemed to be the register of mutations, and the provisions of the code and of these rules which apply to the said register shall apply so far as may be to such rough copy, and the provisions of Rule 111 respecting the introduction of the rewritten copy of the index shall apply so far as may be to the introduction of this first fair copy of the record. Attention of this Court was also further drawn on Rule-111 of the said Rules, which denotes, when the re-written index of land is reported to be complete, the Collector or sub-divisional officer shall fix a date for its inspection and shall cause notice thereof to be given calling upon all persons interested to appear on such date at a specified place in or in the immediate vicinity of the village concerned, and notifying that any such persons may before such date inspect the Index on application. On the date and at the

place appointed the Collector or sub-divisional officer shall compare the new copy with the old index and the Diary of mutations, cause such portions thereof to be read out as any of the persons present may desire to hear, read and make any correction that may be necessary. Such officer shall then sign the new Index and subscribe below it a certificate that the entries therein have been duly tested and found correct. From these two provisions, learned Advocate for the respondents Mr. Desai urges that, firstly, there is no evidence on record that individual notice was served on the parties as envisaged by R.111(1) of the said Rules, and that no certificate is subscribed below the entries as envisaged by sub-Rule (3) of R.111 and, therefore, the Entry No.44 posted on 1959 which is at Exh. 29/1 is of no consequence at all, because neither the individual notices were issued to the parties nor has been certified as per Sub-rule (3) of Rule 111 of the said rule.

7. The attention of this Court was also drawn to Sec. 182 of the Bombay Land Revenue Code, 1879, which denotes that the sale by auction purchase, on confirmation will be certified and this certificate shall state the name of the person declared at the time of sale to the actual purchaser, and any suit brought in a Civil Court against the certified purchaser on the ground that the purchase was made on behalf of another person not the certified purchaser, though by agreement, the name of the certified purchaser was used, shall be dismissed. Relying on this, learned Advocate Mr. Desai urges that Mark 4/9 is the certificate of auction purchase by Musabhai Umarbhai and defendants cannot be heard to say that they are the joint owners of the land in question against the said auction purchase certificate. Attention of this Court was also drawn to Sec. 135 to 141 of the Mohemmedan Law wherein the brothers of the deceased are not entitled to share in the property of a deceased Muslim. Attention of this Court also was drawn to the reply of Notice by Abdul Karim Umarbhai, which is placed at Mark 4/6, which denotes in what circumstances the revenue entry No.44, on which the defendants had placed reliance on such entries, came into existence. Abdul Karim has stated in his reply that that to avoid the operation of Land Ceiling Act, the defendants persuaded Abdul Karimbhai and others to cause the entries made in the revenue record. Learned Advocate Mr. Desai vehemently urged that in these circumstances, at this juncture, the plaintiffs have undoubtedly "triable issue" to be decided in the suit and, therefore, the plaintiffs are entitled to the interim injunction as prayed for. It was urged that at this juncture only the transfer of the

property to third party is sought to be restricted and nothing more than that is prayed for. It was urged that this relief is sought, for the purpose, that if the property changes hand, the whole suit of the plaintiffs will be frustrated, which has `triable issue'. It was urged that the proceedings to challenge Entry No. 44 are initiated by the plaintiffs and the Collector in appeal has though decided against the plaintiffs but the said order which is sought to be placed on record is challenged by further proceedings. Learned Advocate Mr.Desai placed on reliance on a decision of English Court in the matter of AMERICAN CYANAMID CO v. ETHICON LTD., reported in (1975) 1 ALL ER 504, wherein it is held that when the case is not frivolous, on mere balance of convenience, the plaintiffs may be granted interim injunction in his favour. Mr. Desai urges that, therefore, at present, balance of convenience is in favour of the plaintiffs and the plaintiffs are entitled to the interim injunction granted and the Appeal be dismissed.

8. From the rival contentions and perusing the record and the order impugned, it appears that this is the case wherein although the principle of grant or refusal of temporary injunction is well settled, the same is required to be re-stated having regard to the peculiar facts of this case and the manner in which the case has been dealt with by the learned Trial Judge. Needless, it is to say that the temporary injunctions are dealt with by the Civil Procedure Code vide Order 39. The principles which governs the exercise the discretion conferred by this Rule can be set out as under for the guidance.

8.1 Firstly, the plaintiffs must satisfy that there is serious question to be tried in the suit and that on the facts before the court there is a probability of his being entitled to the relief asked for by him. We may label this as a prima facie case of the plaintiffs.

8.2 Secondly, the plaintiffs must satisfy to the court that the interference of court is necessary to protect him from that species of injury which the Court calls irreparable, before his legal right can be established on trial. We may label this as an irreparable injury.

8.3 Thirdly, that the comparative mischief or inconvenience which is likely to issue from withholding the injunction will be greater than

that which is likely to arise from granting it. We may label this as a balance of convenience.

In the present case, this Court is not in agreement with the argument of learned Advocate Mr. Desai that merely establishing balance of convenience in his favour, the plaintiff is entitled to temporary injunction in his favour. That is not the law in India as contemplated in Order 39 of the Code of Civil Procedure. The English decision cited by Mr. Desai (supra) will have no relevance at all with reference to Order 39 of the Civil Procedure Code because the Code itself is exhaustive and explanatory. Even other wise, the decision of the English Court cited above was in respect of the breach of a trade mark wherein the English Court observed that if the case is not frivolous even on the balance of convenience, the plaintiffs may be granted interim injunction. But that is not the law in India as provided under Order 39 of the Civil Procedure Code. On the contrary, the established law of this Country is that the existence of prima facie case alone is not by itself sufficient to grant interim injunction in the favour of the plaintiffs. The plaintiffs must further satisfy the second as well as the third conditions mentioned above to be entitled for interim injunction. Meaning thereby that the plaintiffs must establish the above three conditions to have an order of injunction in his favour. In absence of any one of the above conditions, the plaintiffs would not be entitled to any injunction. Not only that this being the discretionary relief even if plaintiffs establish the above three conditions in the given circumstances, Court may refuse the injunction having regard to the conduct of the plaintiffs and in the circumstances of the case.

9. Examining the documents of title as alleged by the plaintiffs, which is placed at Mark 4/9, which is of the year 1947, it is clear that by no stretch of reasoning, it could be labelled as the certificate of auction purchase. The contents of the documents itself denotes that the lands belong to the State. Thereafter, it was termed as girasdars land which was given for the cultivation to some parties, who surrendered the land to the State, and in auction, the same was given to late Musabhai Umarbhai for cultivation. What is produced before the Court is only rojkam. This rojkam denotes that a formal document in this respect also was required to be executed. However, such formal document has not seen the face of the record. But, undoubtedly, nowhere in this rojkam also it is mentioned that the land in question is sold as a owner to late Musabhai Umarbhai. A

decision of the Mamlatdar of the Land Ceiling Act throws light on this, which says that the girasdars land was given to the private parties for cultivation. This decision is at Exh. 29/2. The right of cultivation in the name of Musabhai whether was continued after 1947 and after this rojkam, is still in dark, and the plaintiffs had not explained this position that after 1947 Musabhai even as a holder as cultivator of the land was continued. While the revenue record placed on the record vide Exh. 28/1 to 28/9 which are the Village Form Nos. 7 and 12 consistently and continuously denote that the land was in the joint name of the five brothers including Musabhai in the revenue record since 1951. Therefore, the rojkam produced by the plaintiffs at Mark 4/9 and `Bhanakatu' produced by the plaintiffs on the record is absolutely of no use to decide that the late Musabhai Umarbhai was the auction purchaser of the land vide above rojkam. At the most, Exh. 4/9 denotes that on surrendering the land belong to the State by other parties, the same was given to late Musabhai for cultivation and the consideration was fixed by the auction, but there is no evidence to denote that even this position was continued thereafter and late Musabhai continued to cultivate the land in question as a cultivator let alone an owner. Except this, there is no evidence at all on the record to denote that late Musabhai was the sole owner of the land in question. The whole issue is unfortunately misconstrued by the Trial Judge because the Trial Judge was convinced that the Mark at 4/9 rojkam was the certificate of purchase. While, in fact, it is mere rojkam and nowhere it is mentioned that the land was purchased by late Musabhai in an auction. In erst while State, the land of girasdars i.e. the State land was given to the citizen for the cultivation and the rojkam as has been produced were exhibited. The rojkam produced itself denotes that it will be followed by a formal document, but that document is not forthcoming. Except this, there is no evidence on the side of the plaintiffs to denote that late Musabhai was the sole owner of the property or even after 1947 Musabhai continued to cultivate the land all alone. Therefore, the plaintiffs have failed to establish the prima facie case. True it is that the prima facie case must not be intermingled with the prima facie title, but the prima facie case denotes the prima facie right of the plaintiffs, which is not brought home by the plaintiffs, and the Trial Judge has only on the assumption that the rojkam was an auction purchase certificate, proceeded to decide the case in favour of the plaintiffs. This is not enough but parties i.e. plaintiffs by their conduct and admissions in this case, have dealt with the property in a manner that it was a

joint property in the name of five brothers and not the property of late Musabhai alone. Because of such admission and estoppel, parties to the proceedings cannot be allowed to approbate and reprobate and to blow hot and cold at the same time. This is so because it is fatal to the system of administration of justice and, therefore, the subsequent conduct of the parties including the plaintiffs and their predecessor dislodges the contention of the plaintiffs that Musabhai was the sole owner of the property on the strength of Exh. 4/9 rojkam.

10. In this case, there is overwhelming evidence on record to come to the conclusion that the property in question was in the joint possession of five brothers of late Musabhai Umarbhai as a tenant of the then girasdars. On operation of the tenancy laws, relevant entries were made in the revenue record at the instance of the parties and since last 50 years, the parties have dealt with the property as such. However, the learned Trial Judge has shut the doors of the appreciation of the evidence on record and had erroneously assumed that late Musabhai Umarbhai was the sole owner of the suit property. In fact, the plaintiffs have made admissions and, therefore, they are estopped from disputing that the present appellants are not the owners of the suit property. Therefore, this is the case of admission and estoppel by admissions. It is known established law that an admission is best evidence against the party making the same and unless it is shown that it is untrue and is made under the circumstances, which does not make it binding on the parties, must be presumed to be true. The weight of the admission increases with the knowledge and deliberations of the speaker or the solemnity of the occasion on which it is made and in these circumstances when the admission is made, the plaintiffs are estopped from the solemn admission made by them. The estoppel which operates in this case is much more stronger because the admissions are made in the judicial proceedings, on which the competent authorities have declared their solemn pronouncements, which for years together, have not been controverted by the plaintiffs. In these circumstances, it is very difficult to believe even at this juncture that there is any prima facie case in favour of the plaintiffs let alone balance of convenience or irreparable injuries. Except the judicial proceedings when mutation entries are allowed to be recorded by consent, the plaintiffs cannot be allowed to dispute such entries. The circumstances of the case including judicial proceedings between the parties destroys the prima facie case of the plaintiffs that late Musabhai Umarbhai was the sole owner. Such evidence on record

which is not properly considered by the Trial Judge is enumerated as under :

10.1 The primary evidence in favour of the defendants is an order of the Mamlatdar acting under the Land Ceiling Act which is placed on record vide Exh. 29/2, in Ceiling Case No. 74/63.For the whole land which is admeasuring about 300 acres as denoted in the rojkam at 4/9, the five brothers effected partition being joint tenant of girasdars. All the five brothers had, in this judicial proceedings i.e. Ceiling Case No. 74/63, stated in the reply that, the suit land was in the joint name of the five brothers of late Musabhai Umarbhai as tenants right from 1951.These statements are recorded by Ceiling Mamlatdar in the above said case on 26.3.1966. The names of brothers are also mentioned in the above said decision.The decision proceeded to pronounce that the five brothers have stated before Ceiling Court that the land in all 300 acres which was subject matter of Entry No.44 was partitioned in 1957 amongst the five brothers of late Musabhai Umarbhai and this partition was effected in the presence of the Manager of Kathiawad Industries. The matter does not rest here and the five brothers further submitted a document of partition before the Mamlatdar in Ceiling Case No. 74/63. The present plaintiff Usmanbhai Musabhai was also party to the above proceedings. Not only that Abdul Karimbhai Darban who by his reply to a notice of the plaintiffs, has supported the plaintiffs has also in 1966 March, stated before the Mamlatdar that the property belonged to five brothers jointly as a tenant and thereafter by promulgation and in pursuance of the tenancy proceedings was mutated in the joint name of the five brothers as owners in the revenue record and thereafter in 1957 the partition was made and each brother had been allotted his share. Yet matter does not rest here. The parties including the plaintiffs had cited one witness in the above said case, and that was the Police Patel Harsanbhai Jivabhai, who was Police Patel of Uchchaiya village, who has also stated that the total land is about 300 acres in the joint possession of the five brothers and thereafter vide partition, each of the five brothers, is enjoying the property fallen in the share of each brother. This Police Patel Harsanbhai Jivabhai had deposed before the

Mamlatdar about the actual physical possession of the land fallen in the share of each brother and from the above, the Ceiling Mamlatdar in the said case, pronounced the judgment that since the land is partitioned amongst five brothers and each brother is enjoying his share in the property from 1957 there was no excess land as per the Land Ceiling Act. This decision is not further challenged by any of the parties and by the admission of the parties including the plaintiffs, it is clear that the property was not of the sole ownership of late Musabhai Umarbhai but property was jointly owned by the five brothers of late Musabhai Umarbhai and it was partitioned amongst five brothers as tenant-in-common and each brother was allotted a share and was enjoying the property. This was the case of the plaintiffs herein in the above said proceedings. After 50 years, the plaintiffs cannot be allowed to take dishonest plea that the entries made in the revenue record were nullity and that it was not a joint property because they are, as per law, estopped from saying so. However, the learned Trial Judge has failed to consider this important aspect of the matter. These circumstances as stated above in the above judicial pronouncement, substantiates the Entry No.44 posted in the revenue record which destroys the contentions of the plaintiffs that late Musabhai Umarbhai was the auction purchaser vide rojkam Mark 4/9.

10.2 It appears that matter would not rest here, but, thereafter, vide document Exh.28/27,Isa Umarbhai, Umarbhai Abdul Karimbhai and Mohmmedali Abdul Karimbhai and Satarbhai Musabhai and Usmanbhai Musabhai, Abdullabhai Musabhai and Abdul Kadir Noormohmedbhai and Yusufbhai Noormohmedbhai i.e. the living brothers out of the five brothers of Musabhai and heirs of the brothers who had expired made an application to Talati of Uchchaiya Village on 24.5.1982, which application denotes that amongst the brothers and the heirs of brothers, the partition was effected and as mentioned in the application, each bother is allotted the property mentioned therein with a request to post necessary entries in the revenue record. All the above said parties i.e. 8 persons had signed this application. Upon receiving this Application, as per Exh. 28/28, the statement was recorded by the concerned

Talati-cum-Mantri of the parties mentioned above, which includes plaintiffs, and they have confirmed the facts of the application dated 24th May, 1985 Mark 28/27 and have signed their statement. Upon that, in Village Form No.6, in the revenue record which is at Exh. 28/30, necessary entries with respect to the share allotted to each of the parties including plaintiffs was recorded by the concerned Talati. Now by no stretch of reasoning, it can be said that revenue authorities have made a wrong entries in the revenue record. On the contrary, entries are made in the revenue record as per instructions given by the plaintiffs and the defendants and on their admission, their respective shares were recorded on partition. This fact further fortifies the fact that Musabhai was not at all the sole owner of the property concerned, and that the property was owned by the five brothers as tenant-in-common right from 1951 and on partition each of the brothers and the heirs of deceased brothers was allotted their respective share, which was recorded in the revenue record. There cannot be any other evidence on record to denote that the suit property which has fallen the share of the defendants was any time was the property owned by late Musabhai as sole owner and false entries in the revenue record was recorded in the name of the defendants. Further, it is established that the plaintiffs have consented and have admitted that the promulgation entry recorded vide Entry No.44 was correct and they have acted and dealt with the property accordingly.

10.3 This is not enough but after the partition when Kasambhai Isabhai expired, his heirs including other parties again requested the Talati-cum-Mantri to post necessary entries and those entries are posted in the revenue record which denotes that the property right from 1951 was dealt with as a joint property. There also, the fact of partition amongst the brothers is admitted by the heirs of Kasambhai Isabhai. The application which was submitted to the Talati by the parties in this respect is produced on Mark 28/22, which denotes that Sarabaiben, w/d of Kasambhai had expired and Kasambhai Umarbhai had no issue, therefore, the land allotted to the share of Kasambhai Umarbhai was requested to be mutated in the name of the parties who were

signatories of this application including the plaintiffs. This is again an admission of the plaintiffs that the property was common as tenant between five brothers and on partititon it was allotted to the share of each of the brothers including plaintiffs. This application which is Exh. 28/22 has been signed by the parties to the suit. This is the further admission of the plaintiffs operates as estoppel against the plaintiffs to raise the contention that the entries in the revenue record were false and that deceased Musabhai was the sole owner of the suit property which has fallen in the share of the defendants.

10.4 The case still not rests here. Musabhai appears to have three sons who are the plaintiffs herein i.e. Satarbhai Musabhai, Usmanbhai Musabhai and Abdulla Musabhai. Amongst three brothers, Abdulla Musabhai appears to have expired before filing of the suit. However, after partition amongst the five brothers, as said above, there was further partitions amongst the heirs of each brothers including the partition between the plaintiffs also took place in respect of the property which had fallen in the share of late Musabhai Umarbhai, out of the property which was owned by five brothers and subject matter of Entry No.44, which is disputed by the plaintiffs. Vide the document at Exh.28/33. Abdulla Musabhai, Usmanbhai Musabhai and Satarbhai Musabhai requested the Talati-cum-mantri by an application signed by them for the partition amongst these three persons about the property which had fallen in the share of late Musabhai Umarbhai out of the property recorded vide Entry No. 44. It is stated by the plaintiffs that the Survey No. 162 and Survey No.188 are partitioned amongst three brothers as mentioned in the application and necessary mutation be made in the revenue record. Relying on this, necessary mutation entries have been made in the revenue record.

11. These are the above mentioned examples of the admissions made by the plaintiffs, by which, the five brothers and the heirs of the brothers have dealt with the property right from 1951 to be the property of the joint ownership and thereafter the property was partitioned amongst the heirs of the brothers and this is the evidence on the record, by which, it is clearly

established that late Musabhai Umarbhai was never the sole owner of the property in question but all the five brothers were tenant-in-common of the suit property, and in pursuance if tenancy proceedings, which is also a judicial proceedings, Entry No.44 was posted in the revenue record, but it is not necessary to discuss each and every evidence in favour of the defendants produced on record, but suffice it to note the above mentioned striking circumstances of the case destroys the contentions of the plaintiffs that the property was owned by late Musabhai Umarbhai and on the strength of Exh. 4/9 they have any triable issue in the suit.

12. The argument on behalf of learned Advocate Mr. Desai in respect of Entry No. 44 cannot be accepted that the same is not certified. Even as per Rules 105 and 111 of the Bombay Land Revenue Code and Rules, as noted by the Collector itself, public notices were issued and the Deputy Collector in the end of those 50 entries, verified each entry including Entry No.44 to have been posted correctly. It is not necessary as contended by Mr. Desai that the exact wordings "certify" ought to have been recorded as per Rule 111 of the said Rules. What is verified below the entries by the competent authority is itself is a certificate. It cannot be said that unless it is written that it is certified the same cannot be said to be a certificate, but the verification on promulgation by the Collector itself is a certificate and, therefore, the contentions that entry is not as per the Bombay Land Revenue Code and the Rules cannot be accepted. On the contrary, entries posted in pursuance of a decision of judicial pronouncement i.e. in pursuance of some tenancy proceedings. The entry itself denotes that the entry was made in pursuance of tenancy proceedings. Meaning thereby that on Independence of India, the girasdar's in the Saurashtra area was abolished and the tenants of girasdars were recognised as owner by the operation of the concerned tenancy law and the entry denotes that the entries in the name of five brothers was the result of tenancy proceedings. By no stretch of reasoning it can be said that such entry has only presumptive value and it is of no consequence, but in my view, the entries made in the revenue record was on admission of the parties and in pursuance of judicial proceedings and which must be considered as conclusive between the parties because the plaintiff is estopped from saying now that the entries made in the revenue record are wrong and is of no consequence.

13. Learned Advocate Mr. Desai has cited some decisions (i) WANDER LTD. vs. ANTOX INDIA PVT. LTD,

reported in 1990 Supp SC.727, (ii) PUNJALAL GIRDHARBHAI PATE vs. (The) Navdeep Co-operative Bank Ltd., reported in 1999 (2) GLH 85; KULDIP RASTOGI vs. VISHVA NATH KHANNA, reported in AIR 1979 202, Delhi and (iv) UTTAR PRADESH CO-OPERATIVE FEDERATION v. SUNDER BROS., reported in AIR 1967 SC 249, to substantiate the contentions that the scope of Appeal From Order is limited and the Appeal From Order is appeal on principle only. True it is that this is established law of the land that the discretion used by the Trial Court in arriving at a decision at interlocutory stage cannot be disturbed only because a second view is possible, but at the same it is also the law of the land that when the discretion used by the Trial Court is arbitrary, capricious and if the order is perverse, it is the pious duty of the appellate court to correct the same. In the present case, the order impugned is arbitrary, capricious and perverse because the learned Trail Judge shut the doors to appreciate the voluminous evidence in the shape of admissions available on record and proceeded to assume by strength of Exh. 4/9 that the rojkam was a certificate of the auction purchase. For the reasons noted above, Exh. 4/9 is nothing but a rojkam. The judicial orders which perpetuates the illegality must be labelled as perverse orders. Needless it is to say that the judicial orders must advance the cause of justice. Here in this case, there was ample evidence of admission of the plaintiffs, judicial pronouncement, conduct of the parties which operates as estoppel against the plaintiffs, the Trial court failed to consider this properly and therefore the order could not be said to be advancing of the cause of justice and hence the order impugned is not only arbitrary or capricious but perverse also. Therefore, the order is required to be set aside and the above mentioned decision cited by the learned Advocate Mr. Desai is not helpful to Mr. Desai. Learned Advocate Mr. Desai has also relied on decisions (i) TEJ SINGH v. RANI HARNAM KAUR, reported in AIR 1925 Lahore, 628; (ii) BRAMBHATT DIWALIBEN CHHABILDAS vs. SURAKSHA CO-OPEATIVE HOUSING SOCIETY LTD., reported in 1997(2) GCD (UJ) 15 and (iii) HERBERT CARBERRY vs. CLARK AND GREIG LTD., reported in AIR 1937 Calcutta 172, to denote that, at this stage, only the Court has to see the triable issue and the final result of the suit cannot be seen. On perusal of the above said three decisions, it clearly appears that there was some prima facie case in favour of the plaintiff by evidence, but in this case, there is no evidence, let alone prima facie evidence of the right of the plaintiffs as sole owner and, therefore, these decisions will not be of helpful to the plaintiffs.

14. Learned Advocate Mr. Desai cited decisions (i) in the matter of RANCHHODBHAI DAYABHAI BARAIYA vs. HASMUKHLAL PRANJIVANDAS SHAH, reported in 1994 (1)GLH 262 (head note `B'); (ii) in the matter of DAMODAR OIL MILL vs. DISTRICT SUPPLY OFFICER, JUNAGADH, reported in 2001 (1) GLH 580; and (iii) in the matter of RATILAL CHUNILAL SOLANKI vs. SHANTILAL CHUNILAL SOLANKI, reported in 1996 (2) GLR 525, to substantiate his say that the entries made in revenue record has only presumptive value. There cannot be any second view regarding the law as established that the revenue entry has presumptive value, but as said above, the case of the plaintiffs is not based on mere entries made in the revenue record, but the case of the defendants - appellants is that the entries made in the revenue record is the result of the request of the parties as made by them to the concerned revenue authorities. If at all, this revenue entries has presumptive value, then also, the presumption in favour of the entries is supported by the admission of the plaintiffs, and there is no evidence to dislodge this presumption, and hence, the above said decisions will not be helpful to the present respondents - original plaintiffs.

15. In fact in unequivocal terms, the plaintiffs have sought relief against the revenue entry No.44 and subsequent entries made by the competent revenue authorities. The suit of the plaintiffs is not merely based on title but relief is claimed that the entries made in the revenue record is nullity. In these circumstances, firstly, the Government is a necessary party and the relief claimed to declare the revenue entries nullity is certainly barred by Sec. 135-L of the Bombay Land Revenue Code, 1879, which clearly establishes that no suit shall lie against the Government or any officer of Government in respect of a claim to have an entry made in any record or register that is maintained under Chapter XIII, or to have any such entry omitted or amended. Therefore, the parties to take proper proceedings before proper forum for grievance against the entries made in the revenue record. The relief claimed itself is barred. Learned Advocate Mr. Desai has sought reliance on a decision of the Supreme Court in the matter of SANKALCHAND J. PATEL vs, VITHALBHAI J. PATEL, reported in 1997 (2) GLR 1041, wherein while discussing Sections 9 and 11 of the Bombay Revenue Jurisdiction Act, 1876, the Supreme Court observed that a reading of Section 11 does not indicate any prohibition on private parties inter se to avail of the remedy of a suit provided under the Code of Civil Procedure, 1908 (C.P.C.). Section 9 of C.P.C. does not expressly or by

necessary implication, prohibits the jurisdiction of the Civil Court to entertain the suit based on title. This decision also denotes that mutation entries are only to enable the State to collect revenues from the person in possession and enjoyment of the property and do not create any title or interest therein.

16. However, this decision will not be helpful to Mr. Desai because the case at hand is not the case that the plaintiffs have filed a suit basing on their title, but the suit is also filed for a declaration that the revenue entries be declared nullity. If any private parties chooses to file a suit basing on title, it is not prevented from doing so and the court shall consider the same dehors the mutation entries made in the revenue records. This is the principle which is established in the above said decision. Now, in this case, as said above, the plaintiffs have also claimed the above declaration in respect of the revenue entries which is barred under Sec. 135-L of the Bombay Land Revenue Code. Further, as said above, on fact, the plaintiffs are not able to establish their title, prima facie. While, as against that, the case of the defendants is not solely rests on revenue entries, but the case of the defendants rests on the admission of the plaintiffs and other circumstances, in pursuance of which the entries have been made in the revenue record. This is not a case of bare mutation entries made dehors the title, for which the private parties are entitled to file suits under Sec. 9 of the Civil Procedure Code. But this is a case wherein the entries have been made at the request of the parties by way of admission, which is required to be considered as an evidence along with the admission of the party. That too in absence of cogent evidence of the plaintiffs about the sole title of late Musabhai Umarbhai in respect of the suit property. In these circumstances, the above said decision also would not be of any use to the plaintiffs.

17. In summing up, it is clear case that after admission before the revenue authorities and more particularly before the Land Ceiling Authority, plaintiffs have approached before the Court with a dishonest plea that late Musabhai Umarbhai was the sole owner of the suit property, and that all the revenue entries were of no consequence. The parties who possessed full knowledge of their rights and the rights of contra parties and by their conduct, have encouraged the contra parties to expend moneys or alter the condition in contravention of the rights for which they contend, cannot call upon the Court for its interference

in equitable jurisdiction. Acquiescence by the plaintiffs also disentitles any equitable relief from the Court of equity. As said above, since last 50 years, right from 1951 as admitted by the plaintiffs, the property in dispute is in possession of the defendants. The defendants have treated the property as the property owned by them before the filing of the suit. The plaintiffs have never objected to this. On the contrary, as said above, has accepted the above position. It is nowhere laid down in the suit that at any time in last 50 years, late Musabhai Umarbhai or his heirs were alone in possession of the suit property. In this view of the matter, it is clear that the defendants are the owners of

the suit property by principle of adverse possession, as has been contended by them. It is nowhere laid down by the defendants that they claimed the property as legal heirs of Musabhai and, therefore, the question does not arise that the defendants claim the property by succession as well as by adverse possession. In these circumstances, granting an injunction in favour of the plaintiffs would be depriving of the legal right of the defendants to enjoy that a property. That would not only amount to unequitable but the same would be unconstitutional and against the law. However, the learned Trail Judge failed to consider this aspect of the matter.

18. In this view of the matter, Appeal is allowed. Impugned order passed by learned Trial Judge below Exh.5 Application of the plaintiffs on 17th Day of April, 2000 in Spl. Civil Suit No. 62 of 2000 is hereby set aside. Application Exh.5 of the plaintiffs - present respondents stands dismissed and rejected. However, in the interest of justice, the ad interim injunction which is granted by the Trial Court in terms of Para 8-A of the application Exh.5, which is confirmed till final disposal of the suit and is in force today is extended for further three weeks from today, if, the respondents herein intend to approach the higher forum. The Trial Court is further directed to dispose of Spl. Civil Suit No. 62 of 2000 according to law as expeditiously as possible but not later than six

months in any case from the date of receipt of the writ of this Court. Office is directed to transmit the writ to the Trial Court as early as possible. No order as to costs.

(J.R. Vora, J.)

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